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SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 681

JOE MIKE AYERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert W. Fraser, Esq.
325 North Broadway
Santa Ana, California
Counsel for Petitioner

William L. Murray, Esq.
112 West Third Street
Santa Ana, California
Of Counsel

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SUPREME COURT OF THE UNITED STATES

October Term, 1956

No._____

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Joe Mike Ayers, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case, November 9,1956.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Fee and Chambers, Circuit Judges) and the dissenting opinion of Pope, Circuit Judge, have not yet been reported. Both of such opinions are appended to this petition and collectively titled "Appendix A".

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit for which review is sought was ordered made and was filed and entered on November 9, 1956.

Prior to the expiration of thirty days after the entry of such judgment petitioner applied to this Court for its order extend-

ing the time within which to file a petition for writ of certiorari herein. On December 10, 1956, an order was made, signed by Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, extending the time for filing petition for writ of certiorari in this cause to and including January 9, 1957.

This petition was filed within the period for which time for such filing was extended, in accordance with the rules of this court. The mandate of the Court of Appeals for the Ninth Circuit has been stayed until decision by this Court.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C., Sec. 1254 (1).

QUESTIONS FOR REVIEW

The questions for review are:

1. Did the Court of Appeals err in affirming the District Court's denial of petitioner's motion for judgment of acquital made at the time of trial, on November 23, 1954?

2. Did the Court of Appeals err in sustaining the conviction of petitioner?

3. Did the Court of Appeals err in holding that petitioner's local selective service board validly classified petitioner as 1-A?

STATUTES AND REGULATIONS

This case involves two sections of the Universal Military Training and Service Act, to wit: 50 U.S.C. App., Section 456(j), in official edition of statutes at 65 Stat. 83; 69 Stat. 223, 603; and 50 U.S.C. App. Section 462(a), in official edition at 62 Stat. 622. Since the provisions of these statutes are lengthy, they are hereafter set out as "Appendix B".

There is also involved Section 1625.2 of Selective Service

Regulations, 32 C.F.R. 1625.2, found at page 1625-3 of the compilation of such regulations published by the Government Printing Office, and which page bears at the lower right hand corner the notation "Packet No. 50, 15 February 1955".

This regulation provides:

1625.2. When Registrant's Classification May be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Southern District of California, Central Division, for failing and refusing to be inducted into the armed forces of the United States as so notified and ordered to do. (Record, pp. 3-4), an offense against the United States, as defined by Section 12 of the Universal Military Training and Service Act,

62 Stat. 622, 50 U.S.C. App., Sec. 462. That Court, wherein petitioner was convicted of the offense charged, had jurisdiction under the provisions of 62 Stat. 826, 18 U.S.C., Sec. 3231. Jurisdiction of the appeal from the judgment and sentence of the District Court was conferred upon the Court of Appeals for the Ninth Circuit by 62 Stat. 929, 28 U.S.C., Sec. 1291.

Trial was held on November 23, 1954, by the court, sitting without a jury. Pursuant to stipulation between counsel, the Government introduced into evidence, as an exhibit, a copy of petitioner's selective service file. The Government introduced no other evidence (Record, pp. 9; 21-22). Petitioner testified and introduced the testimony of another witness, but a transcript of such testimony is not a part of the record on appeal.

In the District Court petitioner moved, under rule 29(a) of the Federal Rules of Criminal Procedure for judgment of acquittal, first at the close of the Government's evidence (Record, p. 9), then at the close of all evidence (Record, p. 10), and again on December 13, 1954, (Record, pp. 11-12). The District Court denied each of these motions, and found petitioner guilty as charged.

The District Court imposed a judgment of conviction and sentence of imprisonment on December 13, 1954, (Record, pp. 13-14). Appeal therefrom was taken to the United States Court of Appeals for the Ninth Circuit (Record, pp. 15-16). The Court of Appeals affirmed the judgment of the District Court by judgment made, filed and entered on November 9, 1956.

The facts which are material to the consideration of the questions presented are contained in petitioner's selective service file, which was a part of the record on appeal, and are as follows:

Petitioner registered for selective service with Local Board No. 140 in San Diego, California, on August 30, 1948. Initially, the board classified him 1-A, on July 11, 1950. He then notified the board that he was a student preparing for the ministry; and on October 27, 1950, the local board reclassified him IV-D.

The IV-D classification was continued until early in 1953. On February 18, 1953, petitioner wrote to the local board stating that he was a "conscientious objector" and requesting that he be furnished the selective service form required of registrants who claim to be conscientiously opposed to participation in war. On the same day the local board wrote to petitioner requesting information as to his current scholastic activities. Thereafter, petitioner answered by letter the questions of th board pertaining to his studies and completed and filed with the local board SSS Form No. 150, wherein he stated the nature and basis of his conscientious objection to participation in war. On March 4, 1953, the local board reclassified him 1-A.

On March 19, 1953, petitioner personally appeared before the local board and explained his reasons for claiming to be a conscientious objector, and the local board then reclassified him 1-O. On April 24, 1953, the local board received a letter from R. R. Sanders, Captain, U.S.A.F., Coordinator of District 6 of Selective Service System, informing the local board that petitioner was not entitled to 1-O classification[1] Without notice or further hearing, the local board reclassified petitioner as 1-A on May 7, 1953.

After petitioner received notice from the local board that he had been reclassified from 1-O to 1-A, he requested another personal appearance before the board. This was granted, and on May 21, 1953, petitioner again personally appeared before

the board, which thereafter continued his 1-A classification.[2] Petitioner took an appeal from that 1-A classification. There followed the customary investigation, hearing and recommendation to the appeal board by the Department of Justice. Both the hearing officer and the Department of Justice recommended against a 1-O classification. On April 15, 1954, the appeal board classified petitioner as 1-A.

Subsequently petitioner was ordered to report for induction into the armed forces. He obeyed the order to report, but refused to take the oath and be inducted.

ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

It is submitted that the instant decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals on the same matter.

No reported case is found wherein another Court of Appeals has considered the exact factual situation presented in this case. However, it is submitted that there are cases decided by other Courts of Appeals upon facts which are so similar to this case as to render them indistinguishable as to applicable principles of law and to establish that such other cases should be judicially characterized as deciding the same questions involved in the present case.

In this case it is contended that the record discloses that the local board applied an erroneous theory of law in classifying petitioner and acted contrary to Selective Service Regulations and in excess of its jurisdiction when it reopened petitioner's classification on May 7, 1953, and reclassified him from 1-O to 1-A. The judges of the Court of Appeals differ as to what the record shows in these particulars, with the majority deciding contrary to petitioner's contention. The essential difference

in the points of view expressed in the majority opinion and in the dissenting opinion is what inferences are to be drawn respecting local board action where the record consists only of the Government's evidence, which disclosed that the local board had, in chronological sequence, classified petitioner 1-O, received a letter from Captain Sanders, U.S.A.F., concerning petitioner's classification and reclassified petitioner from 1-O to 1-A.

The local board received the letter from Captain Sanders on April 24, 1953, and on May 7, 1953, it reopened petitioner's classification and classified him 1-A. The record is devoid of any evidence, other than this letter, upon which the board could have acted. Further, it is submitted, the written summary of petitioner's personal appearance before the local board following this reclassification affirmatively shows that the board was influenced by that letter.

The Sanders letter offered an erroneous basis of law as the basis for reclassifying petitioner. The purported statements of fact contained in that letter do not concern petitioner as an individual but refer to the religious organization to which he belonged and to what action another local board proposed respecting another registrant. The statutory language creating the exemption from military training for conscientious objectors phrases the test for exemptions in terms of the individual's belief not his membership in a sect or organization.[3] The letter contained no facts which, if true, would justify a change in petitioner's classification, and thus reclassification based upon the material in that letter was contrary to selective service regulations[4] and in excess of the jurisdiction of the local board.

The Court of Appeals for the Second Circuit, in **U.S. ex rel. Levy v. Cane,** 2 Cir., 149 F.2d 338, considered the question of what inferences were to be drawn respecting board action

where the record showed that the local board had considered improper material did not influence the decision of the board an advisory recommendation from an extra-legal body concerning the classification to be given a registrant. The court held that because the record did not affirmatively show that the improper material did not influence the decision of the board in classifying the registrant, that such classification must be held invalid. To the same effect, see **United States v. Balough,** 2 Cir., 157 F.2d 939, judgment vacated on other grounds, 329 U. S. 692, 91 L. ed 605, 67 S. Ct. 325.

Two other Courts of Appeals have held that where the record shows that a selective service board may have acted upon an erroneous interpretation of law and is not clear as to what the basis was for board action, that the classification given a selective service registrant by the board is deemed void and insufficient to support a conviction of the offense of failing to report for induction into the armed forces. Such was the decision in **United States v. Hagaman,** 3 Cir., 213 F.2d 86, and in **Ypparila v. United States,** 10 Cir., 219 F.2d 465. Both of these cases cited and relied on **U.S. ex rel. Reel v. Badt,** 2 Cir., 141 F.2d 845. Each of these courts, in the cited cases emphasized the proposition that selective service boards should make their processes sufficiently explicit to reveal so far as may be reasonably practical, whether or not they were keeping within the statute under which they purport to act. In the **Ypparila** case, the Court of Appeals for the Tenth Circuit stated, "We conclude that under the facts and circumstances here presented, the failure of the National Board, at least, to informally state its reasons for its classification was a denial of procedural due process."

But, if the decision of the Court of Appeals in the instant case is characterized as standing for the proposition that the local board's action in reclassifying petitioner contrary to the

provisions of applicable selective service regulations[5] was not a denial of due process, there is another line of cases from another Court of Appeals in conflict therewith. The Court of Appeals for the Second Circuit has held, in **United States v. Fry**, 2 Cir., 203 F.2d 638, and in **United States v. Vincelli**, 2 Cir., 215 F.2d 210, that selective service regulations contain substantial rights and that failure to act in conformity thereto on the part of a local board is a denial of due process which renders a 1-A classification a nullity.

Another reason why this Court should grant a writ of certiorari is that the Court of Appeals has decided a federal question in conflict with applicable decisions of this Court.

The Court of Appeals has decided that failure of the local board to give petitioner access to the information in Captain Sander's letter was not a denial of due process. It is submitted that such decision is contrary to the rule determined by this Court in **Simmons v. United States**, 348 U.S. 397, 99 L. ed. 453, 75 S.Ct 397, and in **Gonzales v. United States**, 348 U.S. 407, 99 L. ed. 467, 75 S.Ct 409. In the former the registrant was not furnished a fair resume of the information in the F.B.I. report concerning him, while in the latter case the registrant did not receive a copy of the recommendation of the Department of Justice. In each of these cases this Court held that the failure of a selective service board to furnish a registrant information concerning himself which could be used in determining his classification in order that the registrant might have the opportunity to meet and refute adverse information was a denial of due process. The opinion of the Court of Appeals states that these cases do not apply to petitioner's situation because the cases decided by this Court involve a denial of a fair hearing at the level of the appeal board whereas petitioner was denied access to information used by the local board. It is submitted that this is a difference without a distinction.

It is respectfully urged that the decisions in the **Simmons** and **Gonzales** cases are not limited to a prohibition against denial of a fair hearing before the appeal board. Rather, it is submitted, these cases stand for the proposition that there is a denial of due process where a selective service registrant is denied a fair hearing at any stage of the classification procedure by reason of being unable to meet and challenge the arguments used against him.

The record shows that Ayers was not given access to the information in Captain Sander's letter. The local board, after receiving that letter, reopened petitioner's classification and reclassified him 1-A without prior notice or hearing. The summary of the second personal appearance contains no reference to the facts contained in that letter.

But from another point of view, and even more clearly, it is submitted, the decision of the Court of Appeals conflicts with the decision of this Court in **Sicurella v. United States,** 348 U.S. 385, 99 L. ed 436, 75 S.Ct 403.

In the **Sicurella case** the registrant had been given a 1-A classification by an appeal board which had received from the Department of Justice a recommendation, premised upon an erroneous interpretation of law, against allowing him an exemption as a conscientious objector. This Court held the classification void and reversed a conviction, stating, " . . . we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly what grounds the Appeal Board decided, the integrity of the selective service system demands, at least, that the Government not recommend illegal grounds."

It is submitted that the instant case falls squarely within the rule of the **Sicurella** case, and that the decision of the Court of Appeals conflicts with the decision of the **Sicurella** case. The only difference in the two cases is that in the instant case the erroneous interpretation of law was directed to the local board rather than to the appeal board. As argued above, that difference should not support a distinction between the two cases. The true principle announced in the **Sicurella** case, it is submitted, is that if any improper ground for classification enters into the classifying of a selective service registrant, at any point, and it is not affirmatively shown that such improper ground did not become the basis for the classification given the registrant then the classification given is void.

However, should this Court determine that the decision of the Court of Appeals does not conflict with the decisions of this Court in **Sicurella v. United States,** 348 U.S. 385, 99 L.ed. 436, 75 S.Ct 403, or in **Simmons v. United States,** 348 U.S. 397, 99 L.ed. 453, 75 S.Ct 397, or in **Gonzales v. United States,** 348 U.S. 407, 99 L.ed. 467, 75 S.Ct 409, an alternative ground is urged for the granting of certiorari. This is that the Court of Appeals here decided an important question of federal law which has not been, but should be, settled by this Court.

If the Court of Appeals decision is construed to hold that an appeal to a selective service appeal board cures a denial of due process of the sort which is here involved which occurred prior to that time before a local board, then this is an important federal question which this Court should decide. The cases decided by this Court which are contended to be in conflict with the subject decision of the Court of Appeals have settled federal law as to the effect of a denial of due process, by either classification possibly based upon an improper ground or failure to afford a fair hearing, in classification by an appeal

board. Unless these decisions of this Court apply to such denial of due process which occurs prior to the classification by the appeal board, this Court should decide the question of whether the classification de novo by the appeal board offers sufficient safeguards to insure the correction of a prior classification based upon an improper ground or made without affording the registrant so classified a fair hearing. Otherwise, this important question of federal law will be left unsettled.

In summary, petitioner urges three reasons as to why this Court should grant a writ of certiorari. They are: (1) this decision of the Court of Appeals is in conflict with other decisions of other Courts of Appeals on the same matter; (2) the Court of Appeals has decided a question of federal law in a way which conflicts with the applicable decisions of this Court; and (3) (as an alternative to the second reason) this decision of the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court. The arguments supporting these reasons all revolve around the inferences which should be drawn from the record respecting the receipt by the local board of the letter from Captain Sanders and the subsequent reclassification of petitioner from 1-O to 1-A by the local board.

For the reasons above set forth and the arguments offered in support thereof, it is respectfully submitted that this Court should grant a writ of certiorari to review this decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Robert W. Fraser,
Counsel for Petitioner

William L. Murray,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOE MIKE AYERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 14,646
Nov. 9, 1956

Upon Appeal from the United States District Court for the Southern District of California, Central Division

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Before: POPE, FEE and CHAMBERS, Circuit Judges
JAMES ALGER FEE, Circuit Judge

Ayers was convicted of a failure to report for induction into the military service in accordance with the order of a local board. The criminal case was tried before a judge of the United States District Court, sitting without a jury by consent. The question decided therefore was one of fact. The judge found upon the facts that defendant was guilty. The proceeding was not a review of the record before the Selective Service Board. Such records only enter the case as evidence to show that appropriate notice was given to defendant to report. Defendant had two witnesses, himself and another, who testified in the case. Upon appeal there is no transcript of record, so we do not know what either of the witnesses said in the District Court.

The Selective Service record was stipulated to and admitted in evidence. Upon the basis of this record, defendant

Ayers now asks reversal of the conviction. This record showed that Ayers registered under the Selective Service system and came up before Local Board No. 140, San Diego County. On July 11, 1950, he was classified by the Local Board in Class 1-A and notified of that action. Shortly thereafter, he sent a letter to the Board appealing his classification on the ground that he was studying for the ministry. Thereupon, Pasadena College verified that registrant was preparing for the ministry in that institution. As a result, the Board placed Ayers in Class 4-D and notified him.

Long Beach State College notified the Board on February 17, 1953, according to the record, that Ayers was enrolled there as a special student with only twelve units of instruction. By letter dated February 18, the Local Board notified registrant that additional information must be supplied if he were to continue in Class 4-D. In a letter dated the same day, Ayers claimed for the first time to be conscientiously opposed to war. On February 24, the Local Board received a second letter from him expanding his reasons for conscientious objection and for transferring from a theological school to a state college. Ayers filed with the Board the special form for conscientious objector, which was almost entirely filled out in the handwriting of a girl who assisted him.

After receipt of this special form, the Local Board on March 4, 1953, again classified Ayers in Class 1-A and notified him by mail on March 5, 1953.

Ayers thereupon requested a personal appearance and appealed this classification of 1-A. As a result, on March 19, 1953, he appeared personally before the Board, and, as a result, the Board agreed to classify him in 1-O. He apparently based his plea in part upon his membership in International Christian Revival Association. Ayers sent a letter dated

March 19, 1953, to confirm his statement of belief, which contains the statement:

> "I will stand and fight for this our America or the world, but I refuse to use the means which the world is using to gain peace."

In a previous letter, he had said:

> "I'm in just a small group of people and we are trusting Christ and His word that He will give us a revival for our day."

In regard to this claim, R. R. Sanders, Captain, U.S.A.F., who was coordinator of District Headquarters No. 6, which was set up under Selective Service Regulation,[1] wrote a letter dated April 23, 1953, giving to the Local Board certain facts which had come to his attention concerning the International Christian Revival Association above mentioned, since the registrant was claiming membership in that association as a basis for his current belief. The pertinent information was that the organization consisted of some twenty members, was incorporated in 1951, and had decided on November 18, 1952, that they were conscientiously opposed to war and on that day passed a resolution to that effect. Advice was given as to the action of another Local Board with reference to a member of the same organization. Complaint is chiefly made of the paragraph in the letter:

> "In view of the above, it would appear that a classification of 1-O is not warranted under the provisions of Section 1622.14 of the Selective Service Regulations."

Thereafter, on regular forms, Ayers volunteered for civilian work and filed these with the Board on April 30, 1953.

The minutes of the Board do not set forth anything as to

[1] 32 C.F.R. (1956) † 1604.14(a).

meetings or discussions thereafter, except that they show that on May 7, 1953, the Board again classified registrant in Class 1-A. On the next day, notification of this classification was mailed to Ayers. By a letter dated May 13, 1953, registrant appealed the 1-A classfication and requested a personal appearance. He enclosed in the letter the "Articles of Belief" of the International Christian Revival Association, to which he belonged. On May 21, 1953, registrant appeared personally before the Local Board and was given another hearing. The Local Board voted to continue registrant in Class 1-A. A copy of the memorandum summarizing what occurred at this personal appearance is contained in the Selective Service file, and on the same day Ayers was notified that he had been continued in Class 1-A.

On June 18, 1953, the Local Board forwarded the Selective Service file of registrant to the Appeal Board. Thereafter, the United States Attorney moved to secure an advisory recommendation from the Department of Justice. Ayers appeared before the hearing officer, who recommended that his claim for exemption be not sustained. In the report of the Department of Justice, it is stated:

> "The Hearing Officer reported that the registrant stated that he was opposed to participation in war in any form. The registrant advised the Hearing Officer, however, that he believed that it was proper for governments to carry on wars and that people should be in the Army. He stated that he believed that it was satisfactory for those who choose to protect themselves through the use of force. He does not believe that he should participate in war." Government Exhibit 1, page 76.

His relation to the association upon which eventually he based refusal of induction is quite confused. The Federal

Bureau of Investigation reported he was dropped from the rolls thereof "in approximately August, 1953." At the hearing, it was shown he was a member accepted as of January 31, 1954. On April 15, 1954, the Appeal Board placed registrant in Class 1-A. On April 19, 1954, the Local Board received the Selective Service file from the Appeal Board. Ayers was notified of his classification in Class 1-A by the Board on the same date. On May 4, 1954, defendant was ordered to report for induction May 19. He requested a transfer to Local Board No. 135, which was granted, and Local Board No. 135 ordered defendant to report for induction June 9, 1954, upon which day he reported for induction but refused to submit thereto.

The points raised on appeal are numerous. It is said that the order to report for induction was void because the Local Board (1) applied an erroneous theory of law in classifying defendant, (2) acted arbitrarily, capriciously and without basis in fact in reclassifying him, (3) acted contrary to regulations by reopening and reconsidering the classification of Ayers, (4) denied Ayers access to information which was the basis of the classification, and (5) denied him a hearing.

The first and second points are considered together. The attack upon the classification of the Board is based simply upon the fact that the letter of Sanders appears in the file. From its mere presence, it is argued that the members were overwhelmed and their judgment vitiated and that an erroneous theory of law was injected into the case. But all this is pure speculation. Again, it is argued that the Board acted arbitrarily and capriciously and without basis of fact in making the classification. It is demonstrated that the Board had firm foundation in the personality and actions of Ayers, and the mere presence of the letter of Sanders in the record of the Board is no proof to the contrary.

In truth, the letter of Captain Sanders really pointed out facts which may not have been previously noticed by or known to the Board. The recent date of the resolution against war by the group of which Ayers claimed to be a member may possibly have been one of the elements in classifying Ayers a second time as 1-A. They may have believed the training and beliefs of Ayers were exemplified by this organization, and the most recent change was accomplished after he was threatened with military service. Captain Sanders was a "District Coordinator," duly authorized by law and regulations[2] to communicate and cooperate with the Local Board. Under the Selective Service System, many of these members of state organizations were properly military officers or had military titles.[3] The Local Boards would have difficulty in learning the facts about religious organizations, some of which are national or international in scope and others of which are relatively small and unknown, as was the case here. There has been no claim that the facts stated in the letter were erroneous or misleading. There was no fraud charged, and on the facts there could not have been. The letter was not directed at Ayers personally, but set out facts concerning the organization whose teachings Ayers was claiming gave him immunity. There is no principle which indicates that the Local Board is confined in the determination of fact to examine only materials which Ayers had brought before them.

The record of this criminal case is fair and complete on its face. The government proved affirmatively each and every material fact necessary for conviction. The record was submitted to the trial judge, together with the testimony of defendant and his witnesses, which is not before this Court.

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[2]32 C.F.R. (1956) †† 1604.12, 1604.14.

[3]32 C.F.R. (1956) † 1604.14(a) specifically authorizes military personnel to be on the staffs of State Headquarters for Selective Service.

There is no showing that anyone testified that the Local Board corruptly or prejudicially classified Ayers.[4] There is no testimony or any record before this Court that the Board gave any weight to the letter of Captain Sanders. This Court cannot decide on such a record that the Board did not give full and impartial consideration to all the facts adduced on both sides and to the personal beliefs and training of the registrant.

The trial judge tried the case and found on the showing before him that defendant was guilty. Since that whole record is not before this Court and there is sufficient evidence to sustain every factor necessary for conviction, we are powerless to set the judgment aside.

It was the essence of the function of the Local Board to examine all the facts and the material on both sides relating to this question. The mere fact that the particular information involved was received from a military officer, who had a legitimate function under the Selective Service System, should not taint the information which he proffered.

There is no showing that the members of the Local Board were overwhelmed by this letter or surrendered their judgment on the facts and the personality of Ayers because it appears in their files. Since it was their duty to weigh these facts, there is no reason, either in the record or as a matter of general knowledge, to question their conclusion.

There is no suggestion in the record anywhere, nor did defendant apparently make an attempt to prove in the District Court, that the Local Board applied an erroneous theory of law in classifying the registrant in this case. The opinion which

[4]The courts have come a long way since Falbo vs. United States, 320 U.S. 549, rehearing denied, 321 U.S. 802, 322 U.S. 770, where the trial courts were directed not to allow evidence upon such subjects to be submitted to the triers of fact. But they have not yet come to the point where speculation can undermine a judgment.

the Captain volunteered in the letter was apparently a conclusion of fact. But Ayers was later before them in person, urging the contrary conclusions of fact. So long as the Board gave a fair hearing, all of the facts were within their competence. Captain Sanders had no power to make classifications himself. The Board was not bound to adopt any conclusion or opinion of his. Besides, the opinion at which the Board finally arrived as to the classification of Ayers has not been found so erroneous or shocking by the trial court as to require that court to set it aside. Nor should this Court substitute its judgment for the judgment of the Local Board[5] or the District Court, each of which apparently acted upon evidence which justified its conclusion.

The record shows clearly that the Local Board had ample basis for its several classifications of Ayers in 1-A, based upon his personal attitude, training and belief as he explained it to them.

The thinking of defendant all through this period is shown by the record to have been extremely confused. He was attending a theological college and got into difficulty because he could not go along with the thinking of his teachers or his fellow students and attacked them, according to his own statement. He then transferred to a secular college. He was enrolled in an organization which did not pass a resolution that its members were opposed to war until November 18, 1952. After his reclassification by the Local Board, he was apparently dropped from membership and later re-enrolled in 1954. The Local Board was entitled to consider this instability of belief and principles. We may therefore answer the second point by saying that the record does not show that the Local Board

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[5]Witmer vs. United States, 348 U.S. 375.

acted arbitrarily and capriciously and without basis in fact in for the third time classifying Ayers as 1-A.

Third, the regulations establish that the Local Board did not act contrary to regulations in changing the classification. As to notice of reclassification, it is stated:

> **"Notice of action when classification considered anew.** When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on (the designated forms) * * *" 32 C.F.R. (1956) † 1625.12.

As to hearing on reclassification, it is stated:

> **"Right of appeal following reopening of classification.** Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification." 32 C.F.R. (1956) † 1625.13.

As to the ordinary right, upon original classification, for personal apearance before the Board, the Regulations provide:

> "Every registrant, after his classification is determined by the local board * * * shall have an opportunity to appear in person before the member or members of the local board * * *" 32 C.F.R. (1956) † 1624.1(a).

There was no denial of applicant's protections under these Regulations.

Furthermore, the Local Board had a perfect right, if facts were called to its attention which might have a bearing upon the personal attitude and beliefs of the applicant, to reclassify Ayers without giving him any notification that such action was impending. The Regulations state that the Local Board can reclassify "upon its own motion if such action is based upon facts not considered when the registrant was classified

which, if true, would justify a change in the registrant's classification." 32 C.F.R. (1956) † 1625.2(b).

By Regulations 1625.11, et seq., it is provided that a reopened classification must be considered anew and that all rights of personal appearance, appeal and other privileges must be accorded to registrant. All these privileges were accorded to Ayers, including a personal appearance and a hearing. The information upon which the Board acted may possibly have been that contained in the letter of Captain Sanders, but this Court is not bound to conclude that that was the only basis or even the motivating basis, since, as noted below, the Board is not required to record its inner thoughts and motives. We only know it did have information which apparently had not been considered before.

Another claim of defendant is that he was denied access to the information which was the basis of his classification. There is nothing in the record which shows this charge to be true. Since the hearing was held soon afterwards, it is to be assumed that any new information which the Board had was acted upon and discussed at that time. The fact that he enclosed the "Articles of Belief" of this organization with his demand for personal appearance indicated he thought the belief as a member thereof was pertinent. Since there was a hearing, we must assume that it was a regular one, and, since the files are public for the inspection of a registrant, it must be assumed that he exercised this privilege. This issue was apparently never raised in the trial court. There is positive evidence in this case that the Board offered to Ayers a 1-A-O classification and that Ayers refused it. In any event, the trial judge decided the case on the questions of fact. Since the entire record is not before this Court, his findings must be accepted.

Since the fifth point is an attack upon the procedure of the

Local Board, the differentiation of the position of that Board and the Appeal Board must be noted. Classification by a Local Board is the keystone of the process of induction.[6] These Boards are composed of residents of the community in which the registrant has lived. The underlying theory is that everyone called for service in the armed forces is entitled to consideration by the local people who presumably know him best. These Local Boards, of course, therefore reflect community knowledge and feeling. It is nowhere said that such local residents are confined to hearing evidence by the registrant. The information they have concerning him, his character and beliefs, may come from any number of sources. They are required to give him a personal hearing at various stages of the proceeding. A denial of such a hearing is fatal. But the Local Board is not required to state exactly what elements they considered in classification or reclassification. There is no requirement that they keep elaborate recordings of the matters discussed, their meetings or their considerations when changing a classification. The requirement that the Local Board keep "minutes"[7] is satisfied by a formal record of action taken and cannot be construed to demand detailed discussions.

The order to report for induction was not void because of the contention that the Local Board denied Ayers a hearing upon his claim to be classified as a conscientious objector. The record shows that he was given a hearing upon each case when he asked for it. The Board showed its fairness by giving full weight to his pleas upon one occasion and only apparently changed its holding in view of the evidence of the inconsistency of his conduct and claim of belief.

In summary, the only basis for the argument that the Local

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[6]Knox vs. United States, 9 Cir., 200 F2d 398.
[7]32 C.F.R. (1956) ¦ 1604.58.

Board **in effect** denied a hearing is found in that the Board did not set out affirmatively each step in the consideration given Ayers. But the fallacy of this position lies in the fact that the government was not under any necessity of proving this part of the record at all. It was only under the necessity of proving that the order to report was given and that defendant violated it and failed to report.

It is the duty of the Appeal Board to classify the registrant de novo.[8] Therefore, if there was any possible deviation from due process, it would be corrected on appeal. Tomlinson vs. United States, 9 Cir., 216 F.2d 12. The only possible exception to this is where the Local Board refused personal appearance to the registrant.

Neither Simmons vs. United States, 348 U.S. 397, nor Gonzales vs. United States, 348 U S. 407, applies. The errors complained of here have to do with Local Board procedure, while in the Simmons and Gonzales cases the matters related to appellate procedure. There is no factual basis herein whereby any contention that a resume of the FBI report was denied Ayers (Simmons vs. United States, supra) or that a copy of the recommendation of the Department of Justice was not sent to him (Gonzales vs. United States, supra). As a matter of fact, the record seems to show all these details were carried out.

This Court has no authority to substitute its view of the situation for either that of the Local Board or of the Appeal Board, where opportunities for personal appearance were given and personal appearances were actually had. Witmer vs. United States, 348 U.S. 375.

Affirmed.

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[8]32 C.F.R. (1956) † 1626.25(c).

POPE, Circuit Judge, dissenting.

Whether the appellant was properly given his 1-A classification, or whether he received due process from the selective service boards, is dependent upon the regularity of what transpired before the local board. The fact that the proceedings before the appeal board may have been regular and in accordance with the applicable regulations, does not, under the circumstances here, aid the position of the Government for this case is governed by the rule stated in Knox v. United States, 9 cir., 200 F. 2d 398. In that case, this court, distinguishing the fact situation which obtained in Tyrrell v. United States, 200 F. 2d 8, and in other similar cases where the action of the appeal board was said to have corrected or cured certain irregularities on the part of the local board, said: (p. 402) "Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities." We reaffirmed and restated our holding in the Knox case in Franks v. United States, 216 F. 2d 266, 270.

In short, under the selective service regulations the registrant is entitled initially to a hearing of his claim of conscientious objection by the local board composed of his own neighbors, whose opportunity to judge of his honesty and sincerity, because of his personal appearance before them, is greater than that of any appeal board which necessarily is dependent upon the second-hand report of a hearing before a Department of Justice hearing officer. What I am saying is, the registrant is entitled to both the hearing before the local board and the

hearing before the appeal board, and the denial of the contemplated hearing before either is a denial of due process called for by the regulations. Such is the holding of the Knox case.

In my view, the case made by the Government was demonstrably insufficient to warrant a conviction. The record of the proceedings before the local board show that on March 19, 1953, after a personal appearance before the Board, the registrant, who had claimed exemption as a conscientious objector by filing the appropriate Form 150, was placed in class 1-O. He was then asked to fill out and did execute and return to the board Form 152 required of 1-O registrants, indicating his qualifications in the event of assignment to civilian work. Two days after that form was mailed to him, but before it had been returned, the board received from R. R. Sanders, Captain USAF, who described himself as "Coordinator, District 6", the following letter:

"23 April 1953

Selective Service System
Local Board No. 140
525 "E" Street
San Diego, California

Subject: AYRES, Joe Mike, SS No. 4-140-29-496
International Christian Revival Association

"Gentlemen:

The subject registrant has been given a classification of 1-O because he claims membership in the subject religious organization, which is located at 1841 W. Palmyra Street, Orange, California.

It so happens that Local Board No. 135, Santa Ana, has recently made an investigation of this organization because

one of their registrants is also claiming to be a conscientious objector, and eligible for Class 1-O.

The investigation revealed that this organization has, at present, only some 20 members, and that they are supervised by Mr. George E. Andrus, 5742 E. Thelma Avenue, Buena Park, California. Mr. Andrus was contacted this date, and stated that he was ordained in 1946. He is employed as a teacher in the Santa Ana Junior College. He advised that subject religious organization was incorporated in 1951, and verified a statement made by the Santa Ana registrant that the group decided, on 18 November 1952, that they were conscientiously opposed to war and on that date, passed a resolution to that effect.

In view of the above, it would appear that a classification of 1-O is not warranted under the provisions of Section 1622.14 of Selective Service Regulations.

For your information, the Santa Ana registrant belonging to this organization is, at the present time, a full-time student and is in a student's classification. It is the intention of Local Board No. 135 to place him in Class 1-A when he no longer qualifies for a student's classification.

Very truly yours,
R. R. Sanders
Captain, USAF
COORDINATOR, DISTRICT 6."

Form 152, together with an executed Form 151, whereby registrant volunteered for civilian work, were received by the board on April 30, 1953. Thereafter and on May 7, without anything further intervening, and without the making of any minutes of a meeting on that day, the board classified registrant

in class 1-A. That is where he stayed and that is the classification upon which his prosecution is based. Thereafter his request for a further personal appearance was granted but the board declined to change this 1-A classification.

The appellant's contention is that his change of classification from 1-O to 1-A was based upon erroneous advice contained in the letter from Captain Sanders. The authorities agree that this burden was upon the Government to prove that this recommendation of the Armed Forces officer did not effect the board's decision. The letter of the officer was about as erroneous and misleading as it could possibly be. In the first place, it says that since the organization, of which registrant was a member, had but recently adopted a resolution of conscientious opposition to war, the classification of the appellant as a conscientious objector was not warranted under the regulations. There is nothing better settled than a man's status as a conscientious objector under the regulations is dependent upon his own personal beliefs, not upon those of the organization of which he is a member. As the Supreme Court said in Sicurella v. United States, 348 U.S. 385, 390: while the belief of the registrant's sect is "relevant", yet "each case must of necessity be based upon th particular beliefs of the individual registrant." In deciding that case, the Supreme Court cited United States v. Everngam, 102 F. Supp. 128, as stating "the correct rule". Everngam was a Catholic. The hearing officer , to whom his case was referred by the appeal board, made a report substantially the same as that which Capt. Sanders made to this local board. The hearing officer said that he too was a Catholic; that he knew all about the Catholic faith, and that the registrant's beliefs were diametrically opposed to the teachings of the Roman Catholic Church and that registrant could not use these teachings as a basis for deferment. He recommended therefore that registrant be

retained in class 1-A. He made no general finding as to the registrant's own religious training and belief. The court held that the report and recommendation was erroneous and arbitrary.

Another respect in which the advice of the representative of the Armed Forces was in error was in asserting that since another local board had ruled that another member of the same religious organization was not eligible for class 1-O, that called for a like ruling on the part of this local board. The error of such a position is manifest.

Finally, the giving and receiving of orders, instructions or opinions from military personnel to draft boards is contrary to the whole concept of the selective service system which is that the process of classification and induction shall be carried on by civilian boards. The regulations (C.F.R. Title 32, †1604.22 and †1604.52) provide that with respect both to the appeal boards and the local boards that no members shall be a member of the Armed Forces or any reserve component thereof.

Of course it is conceivable and possible that the action of the local board in changing appellant's classification from 1-O to 1-A may have been based solely upon the board's further consideration of the evidence which had been before it at the time the 1-O classification was given, and that the Captain's letter and its advice had no part in influencing its action. Even so, since appellant had at least made a prima facie case at the time he was given the 1-O classification, it would still be problematical whether at the time the board changed the classification to 1-A "there was some proof that is incompatible with the registrant's proof of exemption". Dickinson v. United States, 346 U.S. 389, 396. Cf Schuman v. United States, 9 cir. 208 F. 2d 801, 804, and Pitts v. United States, 9 cir., 217 F. 2d 590, 593.

But it is not enough that there was a possibility that the board disregarded or was uninfluenced by the erroneous communication from the Captain. There is nothing more definitely settled than that in a situation of this kind the prosecution must prove that the improper matter or erroneous report or recommendation did not effect the decision of the board.

We have here the precise situation discussed in United States v. Everngam, supra, as follows: (p 131) "It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant. **Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the hearing officer of the Department of Justice did not effect the decision of the appeal board, or any subsequent decision of the local board. No such proof was offered."** (Emphasis mine) That language, of course, was used with respect to the action of an appeal board; but the principle there expressed is just as applicable to the action of a local board.

The Everngam case cited with approval the decision in United States v. Cain, 2 cir., 149 F. 2d 338,342, which was another of the decisions expressly approved by the Supreme Court in Sicurrela v. United States, supra. In that case, a local board made use of a report and recommendation of an advisory panel which contained improper matter. The court pointed out that it was impossible to know to what extent, if any, the decision of the panel influenced the local board. The relator, Cain, was released from custody.

Another case in the Second Circuit expressly approved in Sicurella was United States v. Balough, 157 F. 2d 939, 943, 944. That case also dealt with the receipt by a local board of an erroneous report or recommendation under such circumstances that the court could not tell whether the local board did or did not rely upon the report. The conviction of the registrant was reversed.

The authoritative statement set forth in the quotation from Everngam, supra, that "the prosecution was bound to prove that such invalid report and recommendation . . . did not affect the decision", is also stated in Sicurella v. United States, supra, where the court held that "this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds."

When this court decided the case of Shepherd v. United States, 217 F. 2d 942, the Sicurella decision had not come down. Had it been available at that time this court could have made excellent use of the language last quoted for the facts there are not distinguishable from those dealt with in the Sicurella case. In dealing with the absence of evidence as to whether the board did or did not disregard the erroneous advice it had received, we mentioned the possible argument that there might be a presumption that the board acted regularly and properly and disregarded the advice. We said, p. 946: "(W)e find it difficult to be persuaded in this, a criminal case, that such a presumption is sufficient to negative the likelihood that the board in fact relied upon the erroneous advice of the Depart-

ment of Justice." We reversed the conviction. See also Battelaan v. United States, 217 F. 2d 946. In the Shepherd case, we followed United States v. Hagaman, 3 cir., 213 F. 2d 86, (as did the Tenth Circuit in Ypparila v. United States, 219 F. 2d 465), where the court dealt with action by the National Board which changed the registrant's classification from 1-O to 1-A. There it was conceded that the National Board was wrong if it reclassified the registrant on the theory that his professed creed would not sustain a claim of conscientious objection to war, (the erroneous theory of Capt. Sanders here). There was nothing to show whether the board acted on this or on another ground. The court cited the case of United States v. Badt, 141 F. 2d 845, and said (p. 89): "In the case last cited the court indicated that such agencies as these boards should make their processes 'sufficiently explicit to reveal, so far as may be reasonably practicable, whether or not they are keeping within the statute under which they purport to act". 141 F. 2d at page 848. Of course such disclosure need not be technical or elaborate. And it is not necessary at all in the usual case where the issue in controversy and the basis of decision are made apparent by the record itself. But in cases like the one now before us, the reclassifying board should indicate in a general and non-technical way why it changed the classification."

The only evidence offered on behalf of the United States was the selective service record which, as I have said, failed to indicate either "in a general and non-technical way", or in any manner whatever, why it changed the classification.[1] The Regu-

[1]The minutes of the registrant's later appearance before the board was wholly unenlightening and hardly understandable. They obtained a recital: "He appeared before the board members on March 10, 1953. He was asked if he felt the same about his religious beliefs. He said he did. Board members explained his views were contrary to our beliefs, and according to the Selective Service regulations he cannot be considered in any other classification but 1-A. Therefore the Board

lations, Title 22 §1604.58, required the Board to keep minutes of its meetings. That provision furnished it an opportunity to make its action explicit. Although as stated in the Everngam case, supra, the prosecution was bound to prove that the erroneous report and recommendation did not affect the decision of the Board, the Government failed to make a case against appellant and he should have been acquitted.[2]

(Endorsed:) Opinion and Dissenting Opinion. Filed Nov. 9, 1956. Paul P. O'Brien, Clerk.

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could not change his classification." If this indicates anything, it is that the Board had accepted the theories of Capt. Sanders.

[2]I have said nothing here of another contention of appellant. That is, that he was denied access to the Captain Sanders letter, and an opportunity to refute its statements. Gonzales v. United States, 348 U.S. 407, decided after this case was tried, held that although there is no express regulation to that effect, yet it was "implicit in the Act and Regulations—viewed against our underlying concepts of procedural regularity and basic fair play" that a copy of a Justice Department recommendation to an appeal board must be furnished to a registrant. The same rule should require that this registrant see and have a chance to meet the Captain Sanders letter. The record here fails to show that registrant ever saw or heard of the letter. This matter, differing from that I have discussed in my dissent, is something concerning which the appellant himself might have testified. His testimony at the trial is not a part of the record here. Because of my doubts as to whether the selective service record must itself have shown disclosure of the letter to appellant, I am not prepared to say that the showing here discloses a denial of the right stated in the Gonzales case.

Also, I need say little about the opinion's statement that "There is positive evidence in this case that the board offered Ayers a 1-A-O classification and that Ayers refused it." If that happened just that way it would show another reason why Ayer's classification was void. If the board thought he belonged in 1-A-O classification it was its duty to put him there, for "it was not the local board . . . to say that the registrant should not be placed in a certain classification merely because he did not want that classification". Franks v. United States, 9 cir., 216 F. 2d 266. However, I do not so read the record. What happened was that when the board classified Ayers 1-O it asked him if he would accept non-combatant service, "attend the wounded", and he replied he could not.

APPENDIX B

62 Stat. 622, 50 U. S. C. App. 462(a) provides:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections]; or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdic-

tion, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by court to the trial of cases arising under this title, and such cases shall, upon request of the Attorney-General, be advanced on the docket for immediate hearing."

65 Stat. 83; 69 Stat. 223, 603;50 U. S. C. App. 456(j) provides:

"Nothing contained in this title [sections 451-470 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be

ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix.] Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal, to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate

and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors." As amended June 19, 1951, c. 144, Title 1, † 1 (l-q), 65 Stat. 83; June 30, 1955, c. 250, Title 1, † 101, 69 Stat. 223; Aug. 9, 1955, c. 665, † 3 (b)-(d), 69 Stat. 603.

APPENDIX C.

Selective Service System

DISTRICT HEADQUARTERS NO. 6
3972 Main Street
RIVERSIDE, CALIFORNIA

(Stamp of Local Board)
23 April 1953

Selection Service System
Local Board No. 140
525 "E" Street
San Diego, California

LOCAL BOARD NO. 140
San Diego County
April 24, 1953
Room 222, 525 E Street
San Diego, California

Subjects: AYERS, Joe Mike, SS No. 4-140-29-496
International Christian Revival Association

Gentlemen:

The subject registrant has been given a classification of 1-O because he claims membership in the subject religious organization, which is located at 1841 W. Palmyra Street, Orange, California.

It so happens that Local Board No. 135, Santa Ana, has recently made an investigation of this organization because one of their registrants is also claiming to be a conscientious objector, and eligible for Class 1-O.

The investigation revealed that this organization has, at present, only some 20 members, and that they are supervised

by Mr. George E. Andrus, 5742 E. Thelma Avenue, Buena Park, California. Mr. Andrus was contacted this date, and stated that he was ordained in 1946. He is employed as a teacher in the Santa Ana Junior College. He advised that subject religious organization was incorporated in 1951, and verified a statement made by the Santa Ana registrant that the group decided, on 18 November 1952, that they were conscientiously opposed to war and, on that date, passed a resolution to that effect.

In view of the above, it would appear that a classification of 1-O is not warranted under the provisions of Section 1622.14 of Selective Service Regulations.

For your information, the Santa Ana registrant belonging to this organization is, at the present time, a full-time student and is in a student's classification. It is the intention of Local Board No. 135 to place him in Class 1-A when he no longer qualifies for a student's classification.

Very truly yours,

R. R. SANDERS
Captain, USAF
COORDINATOR, DISTRICT 6

FOOTNOTES

1. This letter is hereafter set out verbatim as "Appendix C."
2. The Minutes of the local board at the time of this personal appearance of petitioner are hereafter set out verbatim as "Appendix D."
3. See 50 U.S.C. App. 456(j), set out at "Appendix B."
4. See Sec. 1625.2 of Selective Service Regulations set out at page 2.
5. The applicable regulation is Sec. 1625.2 of Selective Service Regulations, which is set out at page 3.

APPENDIX D.

PERSONAL APPEARANCE MAY 21, 1953
AYERS, JOE MIKE SS NO. 4-140-29-496

The above named registrant appeared before the members of the local board to appeal his 1-A Classification. He claims to be a conscientious objector to war in any form.

He had appeared before the Board Members on March 19, 1953. He was asked if he felt the same about his religious beliefs. He said he did.

Board Members explained his views were contrary to our beliefs, and according to the Selective Service Regulations he could not be considered in any other classification but 1-A. Therefore, the board could not change his classification.

In that event he asked that his file be sent on to the Board of Appeals, for their consideration. Before this is done however, he wished to place in writing his religious beliefs so that all that information could accompany his file to the Board of Appeal.

Registrant also asked that his Board be transferred to Long Beach, Calif. Members explained that this could not be done. However, he could request transfer to that area, of his inductions, personal appearances, etc., in the future if he so wished.

Board agreed to wait for further information from the registrant before forwarding his file to the Board of Appeal.

JOSEPH LEVIKON

H. A. HAISCH
Clerk, Local Board No. 140
5-21-53

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 681

JOE MIKE AYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 25–34), and dissenting (R. 35–42) opinions of the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1956 (R. 43). On December 10, 1956, the time for filing a petition for a writ of certiorari was extended to January 9, 1957, by Mr. Justice Douglas, and the petition was filed on January 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's local Selective Service board committed procedural error in reopening his conscientious objector classification (Class 1–O) on the basis of new information contained in a letter of a Selective Service coordinator, pending further opportunity given him to appear personally to justify his claim.

2. Whether the local board implicitly adopted an allegedly erroneous interpretation of Selective Service laws contained in this letter, and, if so, whether such error was cured in the process of Selective Service administrative appeal.

3. Whether petitioner was prejudiced by the reopening of his classification and his tentative reclassification to 1–A shortly after receipt of the letter by the board, where such letter was included in his file to which he had access before his second personal appearance before his local board and before the board took definitive action on his claim.

STATUTE INVOLVED

The pertinent provisions of the Universal Military Training and Service Act are set forth in the Appendix, *infra,* pp. 16–18.

STATEMENT

On October 13, 1954, a one-count indictment was returned in the United States District Court for the Southern District of California charging petitioner with knowingly failing and refusing to submit to induction into the armed forces, in violation of Section

12 (a) of the Selective Service Act of 1948, 62 Stat. 604, 622, 50 U. S. C. App. 462 (a), *infra*, pp. 17–18 (R. 3–4). Having waived a jury (R. 5–6), petitioner was found guilty by the court and sentenced to two years' imprisonment (R. 13–14).

The events preceding petitioner's refusal to submit to induction may be summarized as follows:

Petitioner registered with his local Selective Service board on August 30, 1948, and on July 11, 1950, was classified as 1–A (available for service in the armed services) (Ex. 1, pp. 3, 11). Thereupon petitioner stated that he was then and had been for one year enrolled in Pasadena College[1] as a ministerial student, and requested that he be allowed to appeal his 1–A draft classification (Ex. 1, p. 15). On October 27, 1950, petitioner was reclassified 4–D, entitling him to exemption from the draft as a full-time ministerial student (Ex. 1, pp. 3, 11). After further confirmation of his eligibility for this exemption he was retained in class 4–D for over two more years (Ex. 1, pp. 16–24).

On February 17, 1953, Long Beach State College notified petitioner's local board that he had enrolled there as a part-time student (Ex. 1, pp. 25–26). On the basis of this information, the local board notified petitioner on February 18, 1953, that it would require additional information if he were to retain his exempt status (Ex. 1, p. 27).

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[1] Pasadena College is sponsored by the Church of the Nazarene, a church which has taken no official position regarding conscientious objection to military service but leaves this matter up to individual conscience (Ex. 1, pp. 75–77).

In a letter dated the same day (Ex. 1, pp. 28–29) petitioner notified his local board for the first time that he was a conscientious objector, and requested a form by which he could apply for draft exemption. In a subsequent letter (Ex. 1, pp. 32–33) petitioner explained that he had left Pasadena College because of his disagreement with its teachings and had enrolled at Long Beach State College as a part-time student. He explained his belief that it was impossible to kill a man and remain a Christian.

On February 25, 1953, the local board informed petitioner that he was no longer entitled to exemption as a student but that he was being sent a conscientious objector form (Ex. 1, p. 36). On this form which petitioner mailed to his local board on February 25, 1953, petitioner, in response to questions as to the nature of his belief, stated (Ex. 1, p. 37):

> I feel that my first obligation is to God as the scripture states "Render unto Caesar the things which be Caesar's and unto God the things which be God's" and also "Thou shalt not kill."

He stated that "in the last few months" he had come to the conclusion that this belief is in line with the "Word of God," that he would not use physical as opposed to spiritual force under any circumstances whatsoever; that he had left the Nazarene Church and had joined the International Christian Revival Association in the "summer of 1952"; and that the beliefs of this latter organization included opposition to war and to participation in war either directly or indirectly (Ex. 1, pp. 40–41).

Petitioner's local board classified him 1–A on March 4, 1953, (Ex. 1, p. 3) and on March 6, 1953, ordered him to report for an Armed Forces' physical examination (Ex. 1, p. 44). In a letter dated March 9, 1953, petitioner requested that he be given a hearing to appeal his 1–A classification. After he was found physically acceptable for induction, he was notified to appear before the local board on March 19, 1953, for his conscientious objector hearing (Ex. 1, p. 48). At that personal appearance petitioner submitted a letter (Ex. 1, pp. 49–51) stating that he could not participate in the armed services in any way. He also told the board orally in response to a question as to whether he would defend this country if attacked, that he would *not* (Ex. 1, p. 53) "stand up and fight if that's what they meant." The board classified him 1–O (conscientious objector opposed both to combatant and non-combatant duty in the armed services) (Ex. 1, p. 3).

On April 23, 1953, a letter (Ex. 1, p. 58) was sent to petitioner's local board by Captain R. R. Sanders, Coordinator of District 6 of the Selective Service System, stating that the International Christian Revival Association had been investigated in connection with another claim; that it had been incorporated in 1951, and had only 20 members; that the group had decided by vote on November 18, 1952, to be conscientiously opposed to war. The letter concluded:

> In view of the above it would appear that a classification of 1–O is not warranted under the provisions of Section 1622.14 of Selective Service Regulations.

Thereafter on May 7, 1953, petitioner was reclassified 1–A and was notified of the change the next day (Ex. 1, pp. 3, 11). Petitioner wrote the board requesting a personal appearance for the purpose of appealing his 1–A classification (Ex. 1, pp. 11, 63).

After due notice petitioner again appeared before the local board on May 21, 1953, and was asked whether he felt the same about his religious beliefs as he did on March 19, 1953, and he said he did. The minutes of this hearing reflect that the board members did not believe that his claim was sincere (*viz.* Ex. 1, p. 68). Petitioner was then continued in Class 1–A by unanimous vote of the local board (Ex. 1, pp. 3, 11, 69).

On June 18, 1953, petitioner's file was forwarded to the Board of Appeal (Ex. 1, p. 11) and his case was referred by it to the Department of Justice for investigation and hearing (Ex. 1, pp. 76–77). The résumé of the investigative report (Ex. 1, pp. 75–77) contained information concerning his transfers between the Church of the Nazarene and the International Christian Revival Association and reported statements by those who knew him both supporting and detracting from his claim.

Petitioner was granted a personal hearing before a hearing officer of the Department of Justice in connection with his appeal (Ex. 1, p. 72). The hearing officer's report (Ex. 1, pp. 72–74) indicates that petitioner had reaffiliated with the International Christian Revival Association on January 31, 1954, prior to the hearing. Petitioner told the hearing officer that "he was opposed to participation in war in any form"

but stated (Ex. 1, p. 73) "that it was proper for governments to carry on wars," "that people should be in the Army," and "that he believed that it is satisfactory for those who choose to protect themselves through the use of force" but that he did "not believe that he should participate in war." He also told the hearing officer that he did not expect to be exempt because of his activities in the International Christian Revival Association or because of its teachings, but that he would do violence to no man, even in defense of his family; and that "he had not participated in any outward activities of a church nature."

The hearing officer recommended that petitioner's claim to exemption not be sustained, and the recommendation of the Department of Justice concurring in this conclusion was forwarded to the Board of Appeal (Ex. 1, pp. 72–74). On April 15, 1954, petitioner was again classified 1–A by the Board of Appeal.

Petitioner was ordered at first to report for induction on May 19, 1954, and later on June 9, 1954 (Ex. 1, pp. 80–83). On that date petitioner reported but refused to submit to induction because of his claim of being a member of the International Christian Revival Association (Ex. 1, p. 83).

On the trial of this case petitioner moved for a judgment of acquittal (R. 10–11) on the ground, *inter alia,* that his reclassification on May 7, 1953, by his local board (prior to his second hearing) was arbitrary, capricious, without basis in fact and constituted a denial of due process of law, which motion was denied by the court (R. 9–10). Petitioner similarly

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based his appeal (R. 28) principally on the theory that the local board had erroneously reopened his classification *sua sponte* following receipt of the April 23, 1953, letter of the Selective Service District Coordinator, Captain Sanders (*supra*, p. 5). In affirming the judgment of conviction a majority of the Court of Appeals held (R. 25–34) that the mere presence of the letter of Captain Sanders in the file was not conclusive proof that the local board based its reclassification on less than the complete file; that the local board was not confined in its determinations to material which petitioner had produced but could, pending further hearing and opportunity of rebuttal, consider material submitted by a Selective Service District Coordinator whose duties included communicating and cooperating with the local board; that the letter contained information relevant to petitioner's classification; that the procedures followed were in conformity with Selective Service regulations; and that in any event, since the Appeal Board considered petitioner's case *de novo* and rendered the final classification, the asserted error would have been corrected on appeal. Judge Pope, while conceding that there was no showing that the local board relied on the advice contained in Captain Sanders' letter (R. 38), dissented on the ground that the possibility existed that the local board might have relied on, or been influenced by, that letter.

ARGUMENT

1. Petitioner contends that his reclassification following the submission of the letter by the Selective Service District Coordinator to his local board setting

rth new facts concerning the religious organization whose tenets he claimed to subscribe is presumptive roof that his local board reached its ultimate finding gainst his claim on the basis of what his organization d, rather than on an evaluation of the sincerity of s own belief. On this assumption he further argues at despite the *de novo* consideration of his case by e Appeal Board following investigation, a personal earing before a Department of Justice hearing offi-r, and the rendition of a negative recommendation y the Department of Justice on the basis of new and ifferent information relative to his claim, the pres-nce of this letter vitiated the entire administrative roceedings.

There is, however, nothing in the administrative ecord to show the reclassification was improper. The tter contained information which tended to discredit e petitioner's contention that he had a deeply in-rained antipathy towards participation in war based n religious training and belief. As this Court ob-erved in *Witmer* v. *United States,* 348 U. S. 375, 81–382, "[i]n conscientious objector cases * * * any ct which casts doubt on the veracity of the registrant relevant." The record shows that petitioner had ade his claim to conscientious objector exemption Class 1–O) only when he became ineligible for exemp-on as a student, and largely on the basis of the official iews of the International Christian Revival Asso-ation. These views, as Captain Sanders pointed ut, had been formulated only three months before n the basis of a vote of its twenty members. This

new evidence tended in context to show that petitioner's religious views were of very recent origin, significantly coincidental with his ineligibility to further student deferment. These facts, coupled with his failure to present his new claim for exemption until his local board had ascertained independently that he was no longer attending ministerial school, and his "failure to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war" (*Witmer* v. *United States,* 348 U. S. 375, 383), blend to provide a sufficient basis on which the local board could reasonably reopen his classification. Cf. *Witmer* v. *United States, supra; Eagles* v. *Samuels,* 329 U. S. 304, 316–317; *Eagles* v. *Horowitz,* 329 U. S. 317, 322; *United States* v. *Dal Santo,* 205 F. 2d 429, 433 (C. A. 7), certiorari denied, 346 U. S. 858.

The local board was also authorized by Selective Service regulations to receive the letter of Captain Sanders and to consider any pertinent information which it contained. It was entitled to receive information both from private and governmental agencies including the office of the State Director of Selective Service when needed (32 C. F. R. 1621.14). It was authorized to consider all other pertinent information submitted to it (32 C. F. R. 1622.1 (c)), subject to the qualification that such material had to be in writing and be included in the registrant's file. 32 C. F. R. 1623.1 (b). The regulations also provided that (32 C. F. R. 1625.2): "The local board may reopen and consider anew the classification of a registrant * * * (2) upon its own motion if such action is based upon

facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification * * *." When this is done (32 C. F. R. 1625.13): "Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal *as in the case of an original classification.*" [Emphasis added.] In the case of the original classification referred to, the following procedure was provided (32 C. F. R. 1624.1):

> *Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.[2]

The administrative record in this case shows full compliance with these procedures.

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[2] It is also provided that (32 C. F. R. 1624.2):

"(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. * * *"

2. Petitioner's further contention (Pet. 6) "that the record discloses that the local board applied an erroneous theory of law in classifying [him]" is without foundation. While it might be presumed from the fact that petitioner's classification was reopened following receipt of Captain Sanders' letter that the board considered the new information it contained, it cannot be presumed that it adopted his conclusion of law, if in fact such was intended, that petitioner's claim was to be judged otherwise than on its own merits. Aside from the usual presumption of legality of official action, the minutes of the local board taken on the second hearing show that his claim was apparently rejected on the basis of a disbelief in his own sincerity (Ex. 1, p. 68).

Finally, even if it is conceded *arguendo* that petitioner's local board impliedly adopted an erroneous theory of law in reclassifying him, such fact does not impeach the validity of his final classification by the Appeal Board arrived at on the basis of new evidence of his insincerity, the legal sufficiency of which petitioner does not attack here. The purpose of the Selective Service appeal procedure in conscientious objector cases is to provide a *de novo* evaluation of a registrant's claim by a board of experts which completely supersedes the local board action (32 C. F. R. 1626.25, 1626.26). The Appeal Board has before it the registrant's entire Selective Service file including the recommendation of the Department of Justice (based

on a hearing and investigative data), and the final classification by this body is "considered 'final' in the courts, not to be overturned unless there is no basis in fact." *Gonzales* v. *United States,* 348 U. S. 407, 412–413; *Estep* v. *United States,* 327 U. S. 114.

A registrant therefore does not establish the invalidity of this final classification merely by showing that the local board, which accorded the registrant a full hearing and opportunity to establish his claim under Selective Service procedures, denied such claim on an erroneous theory of law. It is to correct such errors of law as well as fact that provision has been made for a fresh evaluation of such cases by administrative appellate bodies. This Court has already held that an erroneous interpretation of the law by a lower board is harmless if the final order (which is the origin of the duty to report for induction) rests on a *de novo* determination by an appellate authority. *Bowles* v. *United States,* 319 U. S. 33; see also: *Capehart* v. *United States,* 237 F. 2d 388, 389–390 (C. A. 4), certiorari denied January 14, 1957, No. 604, this Term; *Tomlinson* v. *United States,* 216 F. 2d 12 (C. A. 9), certiorari denied, 348 U. S. 970; *Reed* v. *United States,* 205 F. 2d 216, 218 (C. A. 9), certiorari denied, 346 U. S. 908; *Tyrrell* v. *United States,* 200 F. 2d 8, 11 (C. A. 9), certiorari denied, 345 U. S. 910.

3. Petitioner's contention that he was denied access to the information contained in Captain Sander's letter is without support in the record. While, follow-

ing receipt of this letter he was tentatively reclassified 1–A pending a further personal appearance to establish his claim in accordance with the usual procedure described above (*supra* pp. 10–11), the letter was made a part of his administrative record and was included in his Selective Service file to which he had access at the time of his interview before the board. Therefore, prior to any definitive action by his local board, he had ample opportunity to "examine it, explain or correct it, or deny it." *Eagles* v. *Samuels,* 329 U. S. 304, 313. He was thus accorded adequate opportunity to rebut all adverse information contained in his file at the crucial point when his local board was considering his claim afresh, and when he was being called on to establish his claim to exemption as though for the first time.

This case therefore is totally different from those cases where the registrant has been denied access to adverse information at the advisory hearing conducted by the Department of Justice (*Simmons* v. *United States,* 348 U. S. 397; and see: *United States* v. *Nugent,* 346 U. S. 1) or to the contents of the Department of Justice recommendation prior to its consideration by the Appeal Board (*Gonzales* v. *United States,* 348 U. S. 407). The procedures followed in this case accord both with Selective Service regulations and fundamental notions of fairness implicit in the concept of due process of law.

CONCLUSION

The decision below is a proper application of the precedents of this Court and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

FEBRUARY 1957.

APPENDIX

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 64 Stat. 1074; 65 Stat. 75, 86:

SECTION 6 (j) [50 U. S. C. App. 456 (j)]:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board,

be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

SECTION 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant

to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

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